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No. 85-2112

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

LODI TRUCK SERVICE, INC.,
Appellant,

v.

DIVISION OF LABOR STANDARDS ENFORCEMENT
DEPARTMENT OF INDUSTRIAL RELATIONS,
STATE OF CALIFORNIA,
Appellee.

On Appeal from the Superior Court of the State of California County of San Joaquin, Appellate Department

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MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

Does the decision of the Superior Court of the State of California, County of San Joaquin, finding that the Industrial Welfare Commission Orders of the State of California regulating overtime wages of mechanics employed in interstate commerce are not pre-empted by the provisions of Section 3102(b)(1) of Title 49 U.S.C. (the Department of Transportation Act) present a substantial federal question?

If the decision of the Superior Court finding that the provisions of the Industrial Welfare Commission regulating overtime wages of mechanics does present a substantial federal question, should the judgment be affirmed based upon the fact that the question was properly determined by the court below?

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MOTION TO DISMISS OR AFFIRM

Appellee, Division of Labor Standards Enforcement [1], pursuant to Rule 16 of the Rules of the Supreme Court of the United States, hereby moves this Honorable Court to dismiss this appeal based upon the ground that this case does not present a substantial federal question, or, in the alternative, to affirm the judgment of the Appel-

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[1] The attorneys for the Labor Commissioner are the attorneys of record in this case and represent the Labor Commissioner, Chief of the Division of Labor Standards Enforcement, in all matters involving wages, hours and working conditions of employees pursuant to applicable law. (See California Labor Code section 98.3).

late Department of the Superior Court of California, San Joaquin County, based upon the ground that the federal question raised below was correctly decided.

INTRODUCTION

This case was tried in the Municipal Court of the Lodi Judicial District, County of San Joaquin, State of California, and resulted in a judgment in favor of appellee, Division of Labor Standards Enforcement, in the amount of $14,831.77 representing overtime wages owed to mechanics employed by the appellant. The judgment was affirmed on appeal to the Appellate Department of the Superior Court of the County of San Joaquin and this appeal followed.

Appellant herein contends that the provisions of the Department of Transportation Act[2], 49 U.S.C. 3102(b)(1) which provides that the Secretary of Transportation shall have the authority to prescribe requirements for, *inter alia*, maximum hours of service of "safety of operation" employees of motor carriers engaged in interstate commerce, have the effect of preventing the State of California, through its Industrial Welfare Commission Orders, from regulating the payment of overtime to such employees.

The main thrust of appellant's argument in this appeal is that the Superior Court did not consider the intent of Congress which, according to the appellant, was to exempt the employees covered by 49 U.S.C. 3102(b)(1) from the overtime regulations of state and municipal laws. According to appellant's theory, Congress manifested this intent when it chose to exempt such safety of

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[2] The Department of Transportation Act provisions regarding the right of the Secretary of Transportation to regulate the hours of safety of operation employees is a recodification of the powers originally bestowed by Congress on the Interstate Commerce Commission in the Motor Carrier Act of 1935.

operation employees from the overtime provisions of the Fair Labor Standards Act (29 U.S.C. 213(b)).

As will be demonstrated, the position of appellant is clearly erroneous. There is no showing that Congress ever intended that even if the Secretary of Transportation were to exercise his authority to regulate such hours, that such regulation would preclude the several states from exercising their police powers to regulate the rate of pay which must be paid to such employees for hours in excess of eight in any one day or forty in any one week. Additionally, more than fifty years after the passage of the original legislation conferring the power, first upon the Interstate Commerce Commission and subsequently upon the Secretary of Transportation, neither federal agency has found it necessary to the safety of the nation's highways to regulate the hours of mechanics.

ARGUMENT

The Intent of Congress to Pre-empt Regulations Adopted By States Under The Police Powers May Not Be Inferred But Must Be Definitely Expressed

The appellant contends that the unexercised power of the Secretary of Transportation contained in the Department of Transportation Act (49 U.S.C. 3104(b)(1)) to regulate the hours of mechanics and other safety of operation employees precludes the State of California from adopting regulations which obligate an employer to compensate such employees at premium rates for all hours in excess of eight in one day or 40 in any one week.

In the case of *H.P. Welch Co. v. State of New Hampshire* (1939) 306 U.S. 79, 59 S.Ct. 438, this Court addressed an issue similar to that contained in the case at bar. In *Welch, supra,* the State of New Hampshire sought to enforce a statute which prohibited drivers of vehicles on its roads from operating in excess of 12 continuous hours. H.P. Welch Company appealed the order

of the State Public Service Commission suspending the firm's registration certificate for violation of the statute. The company contended that the New Hampshire statute was superseded by the passage of the Federal Motor Carrier Act of 1935 (49 U.S.C. 304). This Court found that the facts established that the violation had taken place after the Congress had passed the Act which enabled the Interstate Commerce Commission to regulate hours of employees, but before the Commission had adopted such regulations.

The Court noted that "it cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place. Its purpose to displace the local law must be definitely expressed." (*H.P. Welch Co. v. State of New Hampshire, supra,* 306 U.S. 79 at 85.) The Court clearly stated its views regarding preemption of state statutes by the commerce clause of the Constitution in the *H. P. Welch Co.* case, *supra,* when it held:

> "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution . . . . it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as its purpose to do so is clearly manifested. . .
>
> "Plainly, Congress by mere grant of power to the Interstate Commerce Commission did not intend to supersede state police regulations established for the protection of the public state highways." (*H.P. Welch Co. v. State of New Hampshire, supra,* 306 U.S. at 85).

The Court has not deviated from the views stated in *Welch, supra.* (See *Florida Lime and Avocado Growers v. Paul* (1963) 373 U.S. 132, 83 S.Ct. 1210).

The language of 49 U.S.C. 3102 contains no provision which could logically be construed to manifest an intent by Congress to preempt the inherent right of a state to adopt a minimum wage and to provide for the regulation of the hours of work of employees whose hours are not specifically regulated by the Secretary of Transportation.

The purpose of the enactment of the Motor Carrier Act, according to this Court, was to "secure the benefits of an efficient system. Safety through establishment of maximum hours for drivers was an important consideration." (*Southland Gasoline Co. v. Bayley* (1943) 319 U.S. 44 at 48, 63 S.Ct. 917).

There are varying techniques which may be utilized to enforce limitations on the maximum hours of work. The State of California has chosen the most common technique, the imposition of premium pay for enforcing limitations on the maximum hours of work. (*California Mfrs. Assn. v. Industrial Welfare Comm.* (1980) 109 Cal.App. 3d 95 at 111, 167 Cal.Rptr. 203). The Fair Labor Standards Act, 29 U.S.C. 207, employs the same basic technique.

In order to assure that there would be no overlapping of federal agency jurisdictions, Congress chose to expressly exempt from the overtime requirements of the Fair Labor Standards Act (see 29 U.S.C. 213(b)(1) and (2)) all employees whose maximum hours may be regulated by the Secretary of Transportation. However, there is no evidence that Congress intended to imply that the imposition of a rigid standard of maximum hours was inconsistent with imposition of an obligation to pay premium wages during those maximum hours. In an important comment on the subject of Congressional intent in this regard, this court, in the case of *Levinson v. Spector Motor Service* (1947) 330 U.S. 649, stated:

> "The logic of the situation is that Congress, as a primary consideration, has preserved intact the safety

> program which it and the Interstate Commerce Commission have been developing for motor carriers since 1936. To do this, Congress has prohibited the overlapping of the jurisdiction of the Administrator of the Wage and Hour Division, United States Department of Labor, with that of the Interstate Commerce Commission as to maximum hours of service. Congress might have done otherwise. It might have permitted both Acts to apply. *There is no necessary inconsistency between enforcing rigid maximum hours of service for safety purposes and at the same time, within those limitations, requiring compliance with the increased rates of pay for overtime work done in excess of the limits set in section 7 of the Fair Labor Standards Act.*" (*Levinson v. Spector Motor Service, supra,* at 661) (Emphasis added)

The California Industrial Welfare Commission has recognized that the regulations adopted by the provisions of Title 49, Sections 395.1 to 395.13 of the Code of Federal Regulations which limit the hours of *drivers* engaged in interstate commerce are sufficient protection for that class of employees and has exempted such *drivers* from the overtime provisions of the Industrial Welfare Commisison Orders. (See Title 8, Calif. Administrative Code section 11090, subsection 3(H).)

However, in view of the fact that neither the Interstate Commerce Commission nor the Secretary of Transportation have found it necessary to establish rules or regulations regulating the hours of labor of any other "safety of operation" employees, the Industrial Welfare Commission has not exempted these unprotected employess from the overtime regulations of the Orders.

While there undoubtedly exists a sound rationale for the adoption by the Congress of a scheme of regulating hours of service of safety of operations employees by simply limiting the number of hours they may work in a day; it is not a logical extension of that rationale to contend that, absent such regulation and a clearly mani-

fested intent by Congress to impose exclusive Federal control, there exists a preemption of a state's right to invoke its police powers to require premium pay for overtime.

The fact that Congress expressly declared its intention to limit the number of *Federal* agencies which would have enforcement powers in the transportation industry, does not imply that Congress intended to preempt state activity as to wages, hours and working conditions.

The two Federal Courts which have considered the relationship between state or municipal overtime provisions and the Federal statutory provisions contained in the Fair Labor Standards Act and the Department of Transportation Act (29 U.S.C. 213(b)(1); 49 U.S.C. 3102) determined that the Federal Statutes did not preempt the right of states to enforce provisions of local laws requiring premium rates for overtime.

Perhaps the most instructive case is that of *Williams v. W.M.A. Transit Company* (D.C. Cir.1972) 472 Fed.2d 1258, which involved a consideration of the District of Columbia Minimum Wage Act of 1966, an act passed by Congress which was patterned after the Fair Labor Standards Act. The District Minimum Wage Act contained most of the exemptions contained in Section 213 of the Fair Labor Standards Act with one notable exception: the D.C. Act omitted the exemption from the overtime requirements contained in 29 U.S.C. 213(b)(1) dealing with employees with respect to whom the I.C.C. (now the Secretary of Transportation) has the power to set maximum hours. The Court of Appeals, District of Columbia Circuit in *Williams v. W.M.A., supra,* concluded that the provision in 29 U.S.C. 213 providing an exemption from the overtime provisions for employees covered by I.C.C. or D.O.T. regulations was simply designed to obviate conflicting determinations by Federal agencies as to the requirements and that this is a different matter from the issue whether, or to what extent,

Congress intended to permit State law to apply to such employees.

As the Court in *Williams v. W.M.A. Transit Company, supra*, points out, Congress, in enacting the District of Columbia Minimum Wage Act of 1966, understood that it was exercising the same authority which would be available to any state[3]; yet it did not include the language found at 29 U.S.C. 213 exempting safety of operation employees from the overtime provisions of the legislation. In view of the fact that the Congress understood that it was approaching this legislation as it felt any state legislature could, the Court found that the fact the Congress failed to include the exemption was a powerful indicator that Congress did not intend to extend the exemption to employees covered by state overtime laws.

In the case of *District of Columbia v. Schwerman Trucking Co.* (1974) 327 Atl.2d 818, the District of Columbia's Minimum Wage Act was again before the courts. The District of Columbia Court of Appeals in the case of *Schwerman, supra*, which was published after the effective date of the Judicial Reorganization Act and at a time when the District of Columbia Court of Appeals had final authority to interpret a District of Columbia statute, determined that *Williams, supra*, did not constitute controlling precedent for that court and, as a result, the *Schwerman* Court reexamined the issue of "the asserted exclusion from the overtime provisions of the D.C. Minimum Wage Act of employees subject to hours of service regulations under the Federal Motor Carrier Act." In an exhaustive review of the law and the facts in that case, the court in *Schwerman* concluded that:

> "The answer to the question of whether the motor carrier exemption in the federal wage hour act of

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[3] See 112 Cong. Rec. 750 (1966): Discussion on floor of Senate regarding the District of Columbia Minimum Wage Act, wherein appears the following: "Sen. Javits: 'this proposal really amounts to a State minimum wage law'. Sen. Morse concurs."

> 1938 was also intended to apply to the D.C. Act of 1966 rests entirely upon an appraisal of Congressional intent at the time the latter statute was enacted. In reviewing the earlier local act in 1966, Congress lifted bodily from the Federal wage-hour statute numerous provisions *in haec verba.* Thus, where departures were made from wording in the corresponding sections of the parent act, conscious intent may be inferred.
>
> . . .
>
> "Accordingly, we must infer that the failure to exclude from the overtime coverage of the D.C. Act, the kind of motor carrier personnel defined in Section 13 of the Federal Act was deliberate. In this respect, we agree with the *Williams* opinion of the circuit." (*District of Columbia v. Schwerman Trucking, supra*, 327 Alt.2d at 823-824.)

As another court stated in the case of *Central Delivery Service v. Burch* (D.Md. 1973) 355 Fed.Supp. 954 (affirmed, 486 Fed.2d 1399):

> "If Congress had intended that the overtime regulations adopted under the Motor Carrier Act should be exclusive not only of any right to overtime under the Federal Fair Labor Standards Act, but also of any right to overtime under a private agreement or a State Wage and Hour Act, Congress could easily have so provided. It did not." (*Central Delivery, supra*, at 959)[4]

The reconsideration of the original case of *Williams v. W.M.A., supra*, by the court in *Schwerman Trucking, supra*, arose as a result of an amendment to the District of Columbia Minimum Wage Act of 1966 in response to a written opinion by the District's Corporation Counsel which stated that the Motor Carrier Act exemptions found in the F.L.S.A. did not apply to the D.C. Act. The House of Representatives reacted to the Corporation

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[4] The U.S. Court of Appeals, District of Columbia, adopted the conclusion reached in the *Schwerman* and *Central Delivery* cases, *supra*, in *Dove v. Coupe* (1985) 759 Fed.2d 167, at 171 (fn. 5) and at 173 (fn. 10).

Counsel's opinion by attempting to amend the D.C. Act to incorporate all of the exemptions found in 29 U.S.C. 13(b)(1) into the D.C. Act. In a conference Committee, the Senate forced the acceptance of a Senate amendment to the broad language adopted by the House and the D.C. Act was amended to provide that the overtime provisions did not apply to any employee with respect to whom the Interstate Commerce Commission has chosen to establish regulations provided such employee is not employed more than 50 per cent of any workweek within the defined Washington metropolitan region.[5]

Less than one year after the passage of this amendment, the House again attempted to amend the D.C. Act to provide the complete exemptions found in the F.L.S.A. The Senate struck out the provision and in the conference committee it was agreed to repeal the limited exemption adopted eleven months earlier. In presenting the conference report to the Senate, Senator Eagleton stated:

> "There are two other provisions in the conference agreement which should be called to the attention of the Senate.
>
> "The first provision relates to the overtime exemption for certain categories of employees relating to the trucking industry specifically section 707. Section 707 of the conference substitute amends the District of Columbia Minimum Wage Act to remove from that act an exemption from overtime pay for certain drivers, drivers' helpers, loaders, and mechanics. These employees will now be entitled to overtime compensation as they were prior to the adoption of the exemption." (117 Cong.Rec.Senate 46123, Dec. 10, 1971.)

There can be no clearer manifestation of the intent of Congress that the provisions of the Fair Labor Standards

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[5] The defined metropolitan region encompassed the District, Montgomery and Prince George's Counties in Maryland and the cities and counties of Alexandria and Fairfax in Virginia.

Act providing overtime exemptions for certain classes of employees were not intended to preempt or preclude the several states from adopting overtime laws which cover such employees than the actions of Congress dealing with the District of Columbia Minimum Wage Act. If it were the intent of Congress that the removal of the exemption from the D.C. Act had the effect, as Senator Eagleton stated, of restoring the previously exempt employees entitlement to overtime wages, there can be no doubt that Congress never intended that the exemptions found in Section 13(b)(1) of the F.L.S.A. were to have the effect of precluding the states from adopting and enforcing overtime provisions as to those employees.

It is equally clear that Congress did not intend the provisions of the Department of Transportation Act (49 U.S.C. 3102) to preclude the several states from adopting laws requiring employers of safety of operation employees to compensate such employees at premium pay for hours in excess of eight in any one day or forty in any one week.

If, as appellant contends, the Fair Labor Standards Act superseded and displaced all state and local regulation inconsistent with the provisions of the Act, the states and the District of Columbia would have been precluded from adopting any overtime provision dealing with all those retail and service establishment employees exempted under Section 13 of the F.L.S.A. including employees of amusement or recreational establishments, organized camps, or religious or non-profit educational centers; many agricultural employees; boat and trailer salesmen; and, under certain circumstances, newspaper and radio station employees.

If the breadth of the Fair Labor Standards Act were as broad as appellant contends, there would be little room left for state regulation in the wage and hour field and the provisions of Section 218 of the F.L.S.A. would become meaningless. The mere recitation of the logical

consequences of the appellant's contention, of course, signals the extreme tenuousness of appellant's argument.

CONCLUSION

It appears certain that Congress never intended to preempt the field of wage and hour regulation by the states through the adoption of the Fair Labor Standards Act. The contention that the effect of the Congress' grant of authority to the Secretary of Transportation to regulate the hours of service of safety of operations employees of interstate transportation firms precludes state legislation obligating employers to compensate such employees at premium rates for overtime is equally without merit.

Appellee, Division of Labor Standards Enforcement, respectfully requests that this Honorable Court either dismiss the appeal herein for lack of a substantial Federal question or affirm the judgment below.

Dated: August 22, 1986

Respectfully submitted,

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